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No. 340

IN THE

Supreme Court of the United States

October Term, 1950

J. E. Ross, Jr., a Clerk in the Transportation Department, et al., *Petitioners*,

v.

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, et al., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION OTHER THAN ATLANTIC COAST LINE RAILROAD COMPANY.

I. M. Bailey,
Clem B. Holding,
Raleigh Building,
Raleigh, North Carolina.
Clarence M. Mulholland,
Richard R. Lyman,
741 Nicholas Building,
Toledo, Ohio.
Edward J. Hickey, Jr.,
620 Tower Building,
Washington, D. C.,
Counsel for Respondents Brotherhood of Railway and Steamship Clerks, et al.

Of Counsel:
Bailey and Holding,
Raleigh Building,
Raleigh, North Carolina.
Mulholland, Ross & Hickey,
741 Nicholas Building,
Toledo, Ohio.

Dated: September 13, 1950.

Byron S. Adams, Washington, D. C.

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OPINIONS BELOW.

The opinion of the District Court (R. 27-36) is reported at 88 F. Supp. 115. The opinion of the United States Court of Appeals for the Fourth Circuit (R. 38-43) is reported at 181 F. (2d) 944.

JURISDICTION.

Petitioners invoke the jurisdiction of this Court under 28 U. S. C., Sec. 1254 (1).

QUESTION PRESENTED.

Is a petition to intervene as a matter of right in an action to compel collective bargaining under the Railway Labor Act properly denied where the ground on which intervention is based and the purpose for which it is sought require judicial review of a craft or class determination of the National Mediation Board issued pursuant to Section 2, Ninth of the Railway Labor Act?

STATUTE INVOLVED.

The pertinent provisions of the Railway Labor Act (45 U. S. C., Sec. 151 et seq.) are as follows:

> "Sec. 2. Fourth. . . . The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. . . .
>
> "Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner

as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

STATEMENT.

Certain conclusions, purporting to be statements of fact, are interspersed throughout the Petition and supporting brief which are not supported or justified by the record. Conceivably, these statements might create an erroneous impression of the actual facts of record upon which the issue below was resolved. For this reason, respondents believe that brief comment on these extraneous statements by petitioners is necessary.

In their "Statement of Matter Involved" and throughout their supporting brief, petitioners refer to themselves and other employees occupying the so-called "excepted" positions, whom petitioners purport to represent, as constituting a separate "craft or class" of employees. Such assertion has no basis in fact beyond the mere claim of petitioners that the employees in question *should* constitute a separate craft or class. It simply represents petitioners' contention with respect to the ultimate factual determination which the courts below held to be non-justiciable for the reason that it was a matter exclusively and finally within the jurisdiction of the National Mediation Board.

There is no support in the record for petitioners' repeated statements that these "excepted" employees have been recognized in contracts between the Brotherhood of Rail-

way and Steamship Clerks[1] and the Railroad Company as constituting a separate craft or class, or that they were excepted from the operation of such contracts because they were not within the craft or class for which the Brotherhood was and is the statutory bargaining representative. The contracts did not except them "as a craft or class." They simply specified, under the heading "Exceptions," that "These rules shall not apply to the following: . . ." (R. 17), after which the employees, so excepted from the provisions of the agreement with respect to wages, rules, and working conditions, were listed where necessary to properly identify them. (R. 17-24.)

There is no indication in the record that the carrier itself has ever predicated its unwillingness to apply the standard wages, rules, and working conditions to these employees on any claim that they were a separate craft or class. On the contrary, the carrier's Answer to the Complaint filed in this case alleges, as the basic defense to the action, that the carrier did in fact bargain in good faith with respondent Brotherhood on many occasions with respect to these employees and the establishment of wages, rules and working conditions applicable to their employment. (R. 5-11.) Thus, in the face of this averment by the carrier itself and in view of the entire record below certified to this Court (R. 45-46), petitioners' assertion that since 1921 the employees in question have been recognized by the Brotherhood and the Railroad Company as a separate craft or class simply is not true.

Although it sufficiently appears elsewhere in their Petition and supporting brief, petitioners neglected to mention in their "Statement of Matter Involved" that following an investigation and election conducted by the National Mediation Board respondent Brotherhood was certified by the Board as the representative of the craft or class of clerical, office, station and storehouse employees of the carrier, and that such certification covered the "excepted" employees

[1] Herein referred to as the Brotherhood.

whom petitioners purport to represent. (R. 3, 4, 10, 14 and 15.)

ARGUMENT.

I.

The Question of Federal Law Here Involved Has Been Well Settled by This Court.

Petitioners contend that the court of appeals below has decided an important question of federal law which has not been, but should be settled by this Court.[2] On the contrary, as is immediately apparent from a reading of the opinion of the court of appeals below (R. 38-43), the question of federal law here involved has not only been decided by this Court but is also so well settled that the Petition is clearly without substance and presents no proper basis for review on certiorari.

Petitioner's entire argument is premised on a totally unwarranted misstatement of fact that they are part of a group which constitutes a separate craft or class of employees. Such is not the fact as we have already shown by reference to the record in our Statement, *supra*. Furthermore, the opinion of the court below clearly states that the fact that these employees have been determined by the Mediation Board to be a part of the group of employees represented by the Brotherhood is not even in dispute (R. 39). Thus, petitioners' assumed premise actually represents

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[2] The second reason relied upon by petitioners for the granting of the writ (Pet., p. 5) is, by petitioner's own admission, dependent upon a showing that they have a legal right to court review of craft or class determinations of the Mediation Board. Neither before the court of appeals below nor in their Petition to this court have petitioners disputed the proposition that unless they have a justiciable interest to assert, denial of intervention by the District Court was proper. It would be purposeless, of course, for a court to permit intervention upon the basis of a pleading setting forth an alleged claim as to which the court had no jurisdiction.

their ultimate contention of what the court should decide if they were permitted to intervene.

Accordingly, the real question presented for review is whether the court of appeals below correctly held that the determination of bargaining units and the classification of employees for the purposes of bargaining under Section 2, Ninth of the Railway Labor Act (45 U. S. C. § 152 Ninth) are within the exclusive jurisdiction of the National Mediation Board and are not subject to review by the courts.

In 1943 this Court held that the Mediation Board has the exclusive jurisdiction, not subject to review by the courts, not only to resolve controversies concerning who shall be the representative of a craft or class of employees under the Railway Labor Act, but also "as an incident thereto to determine what is the appropriate craft or class in which the election should be held." *Switchmen's Union of North America, et al.* v. *National Mediation Board,* 320 U. S. 297, 300-301.

Shortly thereafter, this Court, in *Brotherhood of Railway & Steamship Clerks* v. *United Transport Service Employees,* 320 U. S. 715, not only reaffirmed its holding in the *Switchmen's* case that the courts lack jurisdiction to review administrative action of the Mediation Board pursuant to Section 2, Ninth of the Railway Labor Act, but did so in a case where the United States Court of Appeals for the District of Columbia had held the action of the Board to be clearly arbitrary.

In deciding *Steele* v. *L. & N. R. Co.,* 323 U. S. 192, which involved the issue of a bargaining representative's obligations under the Railway Labor Act, this Court reiterated and emphasized its holding in the *Switchmen's* case. It carefully distinguished the existence of jurisdiction in the courts to remedy a breach of a statutory obligation to represent all employees in a craft or class without discrimination because of race or color, from the lack of jurisdiction in the courts to review the administrative proceedings of the Mediation Board which result in certification of bar-

gaining representatives.[3] In so holding, the Court not only expressly included craft determinations of the Board, but also specifically acknowledged the Board's exclusive jurisdiction to determine what employees are properly included within a craft or class. On this point, which is the precise administrative action here sought to be reviewed, this Court said (p. 204):

> "... There is no question here of who is entitled to represent the craft, or who are members of it, issues which have been relegated for settlement to the Mediation Board, *Switchmen's Union* v. *National Mediation Board, supra*; *General Committee* v. *M.-K.-T. R. Co., supra.*"

Moreover, in 1948 the Court was petitioned to review its holding in the *Switchmen's* case on the ground that Section 10 of the Administrative Procedure Act provided judicial review for administrative proceedings of the Mediation Board under Section 2, Ninth of the Railway Labor Act. This Court denied certiorari. *Kirkland* v. *Atlantic Coast Line R. R. Co.*, 335 U. S. 843.[4]

Yet, in the face of the foregoing clearly established and well settled denial of jurisdiction by this Court to review administrative action of the Mediation Board under Section 2, Ninth of the Railway Labor Act, petitioners in effect ask the Court to pass upon the question of whether they can do indirectly what the Court has already held cannot be done directly. No apparent reason is advanced in the Petition as to why such an anomalous request should be granted. Petitioners simply disregard the holding of the *Switchmen's* case, as well as the fact that the lower federal courts

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[3] *Cf. United Transport Serv.* v. *National Mediation Board*, 179 F. 2d 446, 451 (App. D. C.).

[4] The opinion below of the United States Court of Appeals for the District of Columbia, which denied jurisdiction on the authority of the *Switchmen's* case to review administrative action of the Mediation Board under Section 2, Ninth of the Railway Labor Act, is reported at 167 F. 2d 529.

without exception have uniformly applied the jurisdictional holding there established ever since,[5] and rely upon lower court decisions which were all decided prior to the *Switchmen's* case, and which of course are now inapplicable. In citing these cases, they take the position that the *Switchmen's* decision is not controlling in the present case because of an observation in the Court's opinion that "What is open when a court of equity is asked for its affirmative help by granting a decree for the enforcement of a certificate of the Mediation Board under Section 2, Ninth raises questions not now before us."[6] The short reply to such a contention is convincingly provided by Judge Parker speaking for the Court of Appeals below where the identical contention was made. He said (R. 42):

> "It is perfectly clear from what is said elsewhere in that opinion and in the other cases cited, however, that one of the matters not left open to the court is to review the discretion of the Board in the determination of the bargaining unit. . . ."[7]

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[5] *United Transport Service Employes* v. *National Mediation Board*, 141 F. (2d) 724; *National Federation of Railway Workers* v. *National Mediation Board*, 141 F. (2d) 725; *Kirkland, et al.* v. *Atlantic Coast Line R. Co., et al.*, 167 F. (2d) 529, cert. den. 335 U. S. 843; *United Transport Serv.* v. *National Mediation Board, et al.*, 179 F. (2d) 446; *Radio Officers' Union* v. *National Mediation Board*, 181 F. (2d) 801.

In *United Transport Serv.* v. *National Mediation Board, et al., supra*, the court, as in the instant case, specifically held that a *craft or class determination* of the Mediation Board was not within the jurisdiction of the courts to review (179 F. 2d 446, 449-450).

[6] 320 U. S. 297, 307.

[7] Judge Parker also cited, as further evidence of the correctness of the answer given by the court below, this Court's opinion in *Order of Conductors* v. *Penn. R. Co.*, 323 U. S. 166, wherein relief similar to that here sought by petitioners, if permitted to intervene, was denied in the following language (p. 171):

> "The sixth, seventh, and eighth prayers have a similar object. They ask an injunction to prevent the railroad from

II.

The Decision Below is Clearly Correct.

Respondents urge denial of the Petition for the further reason that the decision of the court of appeals is manifestly correct. There can be no serious dispute of the correctness of the lower court's holding, on the basis of decisions of this Court, that determinations of bargaining units and classification of employees for the purposes of bargaining are within the exclusive jurisdiction of the Mediation Board and not subject to review by the courts (R. 40). Likewise, as stated by the court of appeals, whatever this Court intended by the reservation clause in the *Switchmen's* opinion to leave open for review by the courts in an action to compel collective bargaining, it is perfectly clear from what is said elsewhere in the *Switchmen's* opinion and in subsequent decisions of this Court "that one of the matters not left open to the court is to review the discretion of the Board in the determination of the bargaining unit." (R. 42.)

CONCLUSION.

In view of the fact that this case does not involve an important federal question which has not been decided by this Court, but on the contrary presents for review a question which is well settled by decisions of this Court upon which the court of appeals below relied, it is respectfully sub-

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bargaining with trainmen and a mandatory injunction that it shall bargain with the plaintiff as representative of road conductors. Such a decree would be in the teeth of the Board's certification. To grant such a decree would seem to be in contravention of the Switchmen's Union of N. A. Case, 320 U. S. 297, supra, and in any event such action should not be taken in the absence of the Board."

mitted that the petition for a writ of certiorari should be denied.

I. M. Bailey,
Clem B. Holding,
Raleigh Building,
Raleigh, North Carolina.

Clarence M. Mulholland,
Richard R. Lyman,
741 Nicholas Building,
Toledo, Ohio.

Edward J. Hickey, Jr.,
620 Tower Building,
Washington, D. C.,
Counsel for Respondents Brotherhood of Railway and Steamship Clerks, et al.

Of Counsel:

Bailey and Holding,
Raleigh Building,
Raleigh, North Carolina.

Mulholland, Robie & Hickey,
741 Nicholas Building,
Toledo, Ohio.

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